STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2007
v	No. 266555 Oakland Circuit Court
DARRYL JOHN WHITE, Defendant-Appellant.	LC No. 2004-197414-FH

Before: Cooper, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assaulting a police officer and resisting arrest, MCL 750.81d(1), and sentenced to twelve months' probation. He appeals as of right. We affirm.

I. Underlying Facts

On July 9, 2004, defendant was arrested after allegedly pushing a police officer who responded to the scene of a disturbance at a bank branch inside a Kroger grocery store. Michael Kofsky, the regional bank manager, testified that he was in the lobby area when defendant and another customer became verbally abusive toward each other. When Kofsky tried to calm defendant and resolve the situation, defendant became verbally abusive toward him, telling him to "get the f off [him]." Kofsky threatened to call the police and to close defendant's account, but defendant did not calm down. Two uniformed police officers arrived at the scene.[1]

Oakland County Sheriff's Deputy Frank Lenz testified that when he and his partner, Deputy Christopher Gardner, arrived at the bank, several employees pointed toward defendant and he saw defendant flailing his arms, cursing, and acting unruly. Deputy Lenz approached defendant from behind, while Deputy Gardner approached defendant from defendant's right side. Deputy Lenz told defendant in a soft voice to "calm down" and touched him on the right hip area. Defendant turned, looked at Deputy Lenz, and pushed him in the chest area with both of his hands. Deputy Lenz testified that the force of the push knocked him back about three or four

[1] The officers were wearing deputy uniforms, which consisted of dark brown tops, light tan pants with stripes, and badges.

feet. Deputy Gardner ordered defendant to the ground while holding a Taser. When defendant did not comply, Deputy Gardner Tasered him, and Deputy Lenz again ordered him to the ground. Deputy Lenz testified that when defendant asked what he had done wrong, Lenz repeatedly stated, "you can't push a police [officer], you're under arrest for disorderly person." When defendant still did not comply, the officers tackled defendant to the ground, and Deputy Lenz "dry-stunned" defendant with the Taser. Defendant was eventually handcuffed, but remained argumentative with the officers. When defendant refused to get into the patrol car, he was "dry-stunned" again and eventually complied.

Kofsky testified that he did not see the initial interaction between defendant and the officers because he was in a different area. When Kofsky returned, he heard the officers asking defendant to get down on the ground and saw that defendant was not complying. Kofsky testified that a few days after the incident, he viewed a digital video recording of the incident recorded by the bank video surveillance equipment. On the video, he observed one of the police officers approach defendant from behind and get his attention. When defendant saw them, he turned completely around and shoved one of the officers with both of his hands. Kofsky then observed the other officer Taser defendant.

At trial, defendant testified that while waiting in line at the bank, the person behind him "was getting real close to the back of [his] neck," and an argument ensued. The bank manager approached them and took the other person to another area of the bank. Defendant explained that although he was still upset, he was quietly waiting for the manager to return when a person approached him from behind, whispered something in his ear, and "put a taser on his back." Defendant denied knowing that the person was a police officer. Defendant indicated that he spun around, knocking the Taser off his back. Defendant indicated that as Deputy Lenz reached for him, he reacted and "pushed back" or "pushed off." Defendant admitted that he did not comply with the officers' commands to get on the ground, but claimed that he was "just trying to get some space between [him] and them and trying to figure out why they had approached [him] that way." After being Tasered "several times," defendant "went down" and was placed in a patrol car. On cross-examination, defendant admitted that he "pushed" the officer, whom he could see was in some type of uniform, and that he did not follow the commands of the officers. Defendant asserted that he pushed the officer to defend himself.

II. Best Evidence Rule

Defendant argues that he is entitled to a new trial because Kofsky's testimony regarding the contents of the video recording violated the "best evidence rule," MRE 1002. Because defendant did not object to the testimony at trial, we review this unpreserved claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Kofsky testified that the bank video surveillance equipment made a digital video recording of the incident that is destroyed after sixty days. A few days after the incident, Kofsky viewed the video recording and also saved a copy on his laptop computer. Kofsky explained that after some time, he deleted the video recording because he had not heard anything else about the incident and the recording was using a substantial amount of the computer's memory.

Deputy Lenz testified that he did not ask Kofsky about a video. Immediately after the incident, Deputy Lenz did ask a female bank employee if there was any video of the front lobby area of the bank, and she said there was not. He also asked the manager of the Kroger store if there was any surveillance video for the area and, after checking, the manager stated that there was no video.

MRE 1002 provides:

> To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.

An exception to this rule is found in MRE 1004, which states, in relevant part:

> The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—
>
> (1) Originals Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith[.]

It was not plain error for Kofsky to testify about the contents of the video recording. It is undisputed that the original video recording was destroyed, and there is no indication that the prosecution or the police were responsible for destroying the recording. Contrary to defendant's suggestion, Deputy Lenz's actions did not constitute bad faith; indeed, Deputy Lenz asked both a bank employee and a store manager if there was any surveillance video. Defendant cites pre-1990 (and therefore nonbinding under MCR 7.215[J][1]) cases indicating that *negligence* on the part of the police is sufficient to establish a violation of the best evidence rule. However, even assuming that the cases cited by defendant were binding on us, we do not agree that Deputy Lenz's actions here amounted to a sufficient level of negligence such that MRE 1002 was violated. Deputy Lenz did not fail to ask about a video at all, but instead asked two people – two people who might reasonably have known about the existence of a video – whether one existed. We conclude that testimony regarding the contents of the video recording was admissible under MRE 1004.

As part of this issue, defendant suggests that he is entitled to a new trial because potentially exculpatory evidence was destroyed in bad faith. However, defendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). As indicated previously, there is no basis for concluding that the police or the prosecution acted in bad faith. Moreover, defendant has not demonstrated that the evidence was exculpatory. Rather, his assertion that the video recording could have exonerated him is entirely speculative.[2] Consequently, this claim is without merit.

[2] In his brief, defendant argues that the video recording "could have shown the sequence of police 'tasering' of defendant, and could have made it more clear whether defendant was acting
(continued…)

III. Inadmissible Evidence

We reject defendant's claim that a new trial is required because the trial court did not sufficiently address defense counsel's objections to challenged other-acts testimony. Defendant did not argue below that the court improperly handled the objections, and therefore we review this issue for plain error affecting substantial rights. *Carines*, *supra* at 763-764.

During the prosecutor's direct examination of Kofsky, the following exchange occurred:

Q. Did [defendant] calm down at this point?

A. No, he wasn't cooperating. At this point in time, I said you know what, this isn't the first time that this has happened because I've had prior conversations with the branch manager with regards to [defendant].

[*Defense counsel*]: Well, objection to what conversations he had with the manager. It's hearsay and what might have happened on others (sic) dates isn't relevant to this jury's determination.

[*The trial court*]: Response?

[*The prosecutor*]: Well, your Honor, I'll withdraw it at his point but if there's a part in his testimony where it is relevant as to why he did what he did then I would ask if we could -

[*The trial court*]: And if proper notice has been given, perhaps. Sir, confine yourself to answering the question as directly as you can. That answer is struck. Next question, please.

During subsequent questioning, the following exchange occurred:

Q. What happened then?

A. I told him that if he doesn't calm down that eventually I'm going to close down his account because of this, because this has happened in the past with his anger -

[*Defense counsel*]: Well, objection to what happened in the past, your Honor. It's irrelevant to this, what happened on the date in question and the jury's determination as to this specific charge.

[*The prosecutor*]: You Honor, I'll move on.

[*The trial court*]: That answer is struck again. We're not interested in the reasons that you're acting sir, we're interested in the facts that happen which

(…continued)

intentionally, or just reacting to a chain of events beyond his control."

> means, basically, what you saw and heard on this day, not why you acted but what you saw and heard [defendant] do.

The record does not support defendant's claim that the jury was allowed to consider evidence of his prior bad acts. In both instances, the trial court impliedly sustained defense counsel's objection. More importantly, the court struck the unresponsive answers and instructed the witness to answer the questions directly. Defendant did not request any further action by the trial court. The prosecutor did not pursue the matter or discuss defendant's alleged past incidents in closing argument. In its final instructions, the trial court reminded the jurors of their oath to return a verdict based only on the evidence and the court's instructions on the law, and further instructed:

> During trial, evidence was excluded or struck that was heard. Do not consider those things in deciding the case. Make your decision only on the evidence that was admitted and nothing else . . . . To repeat, you must decide this case based only on the evidence that was admitted during trial.

"Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Defendant is not entitled to a new trial.

IV. Ineffective Assistance of Counsel

Defendant also argues that a new trial is required because defense counsel was ineffective at trial. We disagree.

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, "a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms" and that the representation so prejudiced the defendant that "there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Id.*

We reject defendant's claim that defense counsel was ineffective for failing to object to the unpreserved claim of error discussed in part II and for failing to object more specifically and request a cautionary instruction with respect to the claim of error discussed in part III. In light of our conclusion in part II that the evidence was admissible under MRE 1004, along with our conclusion in part III that the court struck the challenged testimony and later instructed the jury not to consider evidence that was excluded or struck, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceedings would have been different. *Id.*

Defendant also argues that defense counsel was ineffective for cross-examining Kofsky about the video recording of the incident because such questioning "only accentuate[d] the evidence by clarifying and drawing more attention to it." However, decisions about what questions to ask are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). In his brief, defendant acknowledges that defense counsel's questions were "a valiant attempt to discredit Mr. Kofsky's stated observations," but then

basically asserts that "in the end" it did not work. This Court will not second-guess counsel in matters of trial strategy. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The fact that the strategy chosen did not work does not constitute ineffective assistance of counsel. *Id*. Additionally, defendant has not identified any damaging evidence that was elicited on the cross-examination of Kofsky that would have changed the result of the proceedings. *Effinger*, *supra* at 69.

Defendant further argues that defense counsel was ineffective for cross-examining Deputy Lenz regarding a notation in his police report that defendant was carrying a knife in his pocket at the time of the incident. Defense counsel asked Deputy Lenz why he had not put that seemingly important fact in the general incident report, but included it in his Taser report. Defendant argues that this was an ineffective method of impeaching Deputy Lenz "and only served to unnecessarily suggest to the jury that defendant is a dangerous person."

Defendant has not overcome the presumption that defense counsel's decision was reasonable trial strategy, nor has he shown that the evidence affected the outcome of the proceedings. As defendant acknowledges in his brief, defense counsel was attempting to discredit Deputy Lenz's credibility. Given that Deputy Lenz's testimony was the chief evidence against defendant, attacking his testimony was crucial. Defendant's complaint is that counsel was "ineffective" in doing so. Again, we will not second-guess counsel in matters of trial strategy, and the fact that the strategy did not work does not render its use ineffective assistance. *Stewart*, *supra* at 42. Further, given the weight of the evidence produced at trial, no reasonable likelihood exists that defendant would not have been convicted if defense counsel had not questioned the officer about the knife. *Effinger*, *supra* at 69. Consequently, defendant cannot establish a claim of ineffective assistance of counsel.

Affirmed.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter